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FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Jan 03, 2022

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

HER MAJESTY THE QUEEN IN RIGHT
OF CANADA AS REPRESENTED BY
THE MINISTER OF AGRICULTURE
AND AGRI-FOOD, a Canadian
governmental authority,

Plaintiff/Counter-Defendant,

v.

VAN WELL NURSERY, INC., a
Washington Corporation; MONSON
FRUIT COMPANY, INC., a Washington
Corporation; GORDON GOODWIN, an
individual; and SALLY GOODWIN, an
individual,

Defendants/Counter-Plaintiffs,

v.

SUMMERLAND VARIETIES
CORPORATION,

Third Party Defendant/
Counter-Defendant.

No. 2:20-CV-00181-SAB

**ORDER DENYING
PLAINTIFF'S MOTION TO
DISMISS AND DEFENDANTS'
MOTION FOR PARTIAL
SUMMARY JUDGMENT**

ORDER DENYING PLAINTIFF'S MOTION TO DISMISS...*1

1 Before the Court are Defendants' Motion for Partial Summary Judgment on
2 Invalidity, ECF No. 78, and Plaintiff and Third-Party Defendant's Motion to
3 Dismiss Counterclaim Number 3, ECF No. 90. The Court held oral argument on
4 November 9, 2021. ECF No. 157. Plaintiff Her Majesty the Queen in Right of
5 Canada as represented by the Minister of Agriculture and Agri-Food ("AAFC") is
6 represented by Gaspare Bono, Jennifer Bennett, Leanna Anderson, Leslie Barry,
7 and Daniel Short; Third-Party Defendant Summerland Varieties Corporation
8 ("SVC") is also represented by Daniel Short and Jennifer Bennett.¹ Defendant Van
9 Well Nursery, Inc. ("Van Well") is represented by Kent Doll, Quentin Batjer, and
10 Timothy Billick; Defendants Gordon Goodwin and Sally Goodwin (the
11 "Goodwins") are also represented by Quentin Batjer and Timothy Billick.
12 Defendant Monson Fruit Company, Inc. ("Monson Fruit") is represented by Mark
13 Walters, Mitchell West, and Kevin Regan.

14 The Court has reviewed the parties' briefing and applicable caselaw, heard
15 oral argument from counsel, and is fully informed. The Court holds that genuine
16 disputes of material fact preclude judgment as a matter of law on patent invalidity,
17 and therefore, Defendants' Motion for Partial Summary Judgment is denied.
18 Construing facts in the light most favorable to AAFC and SVC, a reasonable jury
19 could find that the testing agreements did not amount to a commercial sale or offer.

20 With respect to Plaintiff and Third-Party Defendant's Motion to Dismiss
21 Counterclaim Number 3, the Court holds that Monson Fruit, Van Well, and the
22 Goodwins have stated a plausible claim under Section 2 of the Sherman Antitrust
23 Act of 1890, 15 U.S.C. § 2, and theory of *Walker Process* fraud. Because the
24 counterclaim meets the pleading standard of *Twombly*, the motion is denied.

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27 ¹ Because a notice of appearance was not filed on behalf of SVC, the Court
28 assumes that the attorneys signing pleadings for SVC are its only representatives.
See, e.g., ECF No. 90 at 1; ECF No. 101 at 1, 31.

ORDER DENYING PLAINTIFF'S MOTION TO DISMISS...*2

1 Procedural History

2 Plaintiff AAFC filed this action on May 18, 2020. ECF No. 1. It alleges
3 eight causes of action: (1) plant patent infringement in violation of 35 U.S.C.
4 § 271; (2) correction of inventorship under 35 U.S.C. § 256 against the Goodwins;
5 (3) declaratory judgment under 28 U.S.C. § 2201 against the Goodwins; (4) unfair
6 competition and false designation of origin in violation of the Lanham Act;
7 (5) false advertising under the Lanham Act; (6) conversion; (7) tortious
8 interference with economic relations; and (8) unfair competition in violation of
9 Wash. Rev. Code § 19.86.020. Monson Fruit, Van Well, and the Goodwins deny
10 all claims against them; they also present counterclaims against AAFC and SVC.
11 Monson Fruit, Van Well, and the Goodwins seek declaratory judgment of patent
12 invalidity and unenforceability; as is relevant here, they also assert a third cause of
13 action for unlawful restraint of trade under the theory of *Walker Process*
14 *Equipment, Inc. v. Food Machinery Chemical Corp.*, 382 U.S. 172 (1965). AAFC
15 and SVC deny each claim.

16 The Court issued a Jury Trial Scheduling Order in this matter on August 6,
17 2020. ECF No. 29. Shortly after, the Court granted the parties' Stipulated Motion
18 for Protective Order. ECF Nos. 32, 33. Monson Fruit filed a Stipulated Motion to
19 Seal on October 29, 2020, ECF No. 34, which the Court granted on October 30,
20 2020. ECF No. 36. Monson Fruit, Van Well, and the Goodwins filed a Motion to
21 Dismiss on November 5, 2020. ECF No. 40. The Court denied the Motion to
22 Dismiss on January 13, 2021. ECF No. 51.

23 On March 18, 2021, Monson Fruit filed a Motion for Leave to File an
24 Amended Answer to assert counterclaims against AAFC and SVC. ECF No. 55.
25 The Court granted the Motion for Leave on April 23, 2021. ECF No. 62. Monson
26 Fruit, Van Well, and the Goodwins filed the present Motion for Partial Summary
27 Judgment on Invalidity on July 22, 2021, ECF No. 78, and AAFC and SVC filed
28 the Motion to Dismiss Counterclaim Number 3 on July 27, 2021. ECF No. 90.

1 On September 28, 2021, the Court issued an Amended Jury Trial Scheduling
2 Order. ECF No. 141. Monson Fruit filed a Motion to Compel on September 23,
3 2021, ECF No. 138, Motion for Order for International Judicial Assistance on
4 October 11, 2021, ECF No. 146, and associated Motion to Expedite Hearing the
5 same day. ECF No. 148.

6 On December 6, 2021, the Court granted, in part, Monson Fruit's Motion to
7 Compel. ECF No. 158. The Court also granted Monson Fruit's Motion for Order
8 for Judicial Assistance on December 8, 2021. The jury trial in this action is set for
9 October 17, 2022.

10 **Background**

11 A. Development of Staccato

12 The following facts are undisputed and derive from Monson Fruit, Van
13 Well, and the Goodwins' Statement of Material Facts Not in Dispute, ECF No. 79;
14 AAFC and SVC's Response to Defendants' Rule 56 Statement of Material Facts,
15 ECF No. 102; and Monson Fruit, Van Well, and the Goodwins' Statement of
16 Responsive Facts re: Motion for Partial Summary Judgment on Invalidity, ECF
17 No. 128.

18 Staccato is a Canadian-bred and late-maturing sweet cherry tree. The
19 Staccato variety was first crossed at the Pacific Agri-Food Research Center in 1982
20 and discovered by the inventor, Dr. David Lane, the same year. Staccato was
21 planted out as a seedling in 1984, and beginning around 1990, the fruit was
22 evaluated from this seedling. In August 1990, four Staccato trees were created by
23 T-budding² vegetative buds of Staccato onto Mazzard rootstock in Canada. The
24 resulting trees were grown in a nursery, dug up in the fall of 1991, and stored over
25 winter. In 1991, Staccato was given the Breeders Reference Number 13S-20-09.
26 Then, in spring of 1992, the trees were removed from storage and planted in a

27
28 ² T-budding refers to the practice of grafting a scion bud to rootstock to propagate
a new plant.

1 field. The specific trees were stable in their horticultural traits and no off-types or
 2 variants occurred in the environment tested. For each season after 1992, Staccato
 3 was asexually reproduced in Canada and its distinguishing traits were conserved
 4 over each successive generation.

5 Third-Party Defendant SVC, also known as Okanagan Plant Improvement
 6 Corporation, is responsible for managing and licensing AAFC's intellectual
 7 property for certain fruit varieties. SVC entered into "testing agreements" or
 8 "growing contracts" whereby it supplied growers with designated varieties of
 9 scions, including Staccato, to plant on specific rootstocks. The agreements
 10 permitted growers to "access, test and evaluate the plant material" of Staccato,
 11 provided that SVC remained the "holder of exclusive evaluation, distribution,
 12 propagation, and commercialization rights for the Agriculture and Agri-Food
 13 Canada, Summerland[.]" ECF No. 82 at 6–8. Among other things, many
 14 agreements on record provided that the Staccato plant material "remain[ed] the
 15 property of the party of origin (Agriculture and Agri-Food Canada, Summerland
 16 Research Centre)," and that the grower would not "give, sell, transfer or otherwise
 17 dispose of the plant material to any other person" or "propagate or reproduce the
 18 plant material." *See, e.g.*, ECF No. 111-1 at 2–3.

19 On March 13, 2000, SVC filed an application for plant variety protection for
 20 Staccato in Canada. On March 6, 2002, AAFC filed Application Serial Number
 21 10/379,714 in the United States, claiming a U.S. patent for Staccato. ECF No. 1-1.
 22 SVC, working with the inventor Dr. Lane, also filed U.S. Application Serial No.
 23 60/363,574 on March 13, 2002. A patent (U.S. Patent Number 20,551 P3, or the
 24 "'551 Patent") was issued for Staccato in the United States on December 15, 2009.
 25 The '551 Patent claims priority to the provisional application filed on March 13,
 26 2002.

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1 B. Counterclaim Number 3: Unlawful Restraint of Trade

2 The following facts relate only to Monson Fruit, Van Well, and the
 3 Goodwins' allegations as pleaded in support of their antitrust counterclaims against
 4 AAFC and SVC.

5 Monson Fruit, Van Well, and the Goodwins allege that AAFC and SVC
 6 withheld critical information from the United States Patent Office ("U.S. PTO")
 7 regarding prior distribution of Staccato during prosecution of its patent. ECF No.
 8 63 at 59, ¶ 38. Monson Fruit, Van Well, and the Goodwins declare that the
 9 growing contracts described above amount to "public use" and commercialization
 10 of Staccato; and if the U.S. PTO had been aware of the contracts, the U.S. PTO
 11 would have denied the patent application due to the on-sale bar.³

12 In their Amended Answers, Monson Fruit, Van Well, and the Goodwins
 13 name individuals who they allege intentionally and knowingly withheld
 14 information that was material to the U.S. PTO's decision. *Id.* at ¶ 37. They assert
 15 that the U.S. PTO Examiner requested information from Dr. Lane and SVC on if,
 16 and when, the claimed plant variety "was publicly available prior to the filing date
 17 of the instant application," including "catalogs" depicting the invention. *Id.* at 58,
 18 ¶¶ 35–36. In response to the U.S. PTO correspondence, Monson Fruit, Van Well,
 19 and the Goodwins assert that Wendy Couriard and Ken Haddrell, as well as Dr.
 20 Lane, withheld material information from the Examiner, including a C&O Nursey
 21 1999 fall catalog depicting Staccato and the growing agreements that were
 22 executed. *Id.* at 59–60, ¶ 38. Monson Fruit, Van Well, and the Goodwins assert this

23 ³ Under the version of the Patent Act that governs this case (*i.e.*, in effect prior to
 24 the passage of the Leahy-Smith America Invents Act, Pub. L. No. 112-29, effective
 25 September 16, 2012), "[a] person shall be entitled to a patent unless . . . the
 26 invention was . . . on sale in this country, more than one year prior to the date of
 27 the application for patent in the United States." 35 U.S.C. § 102(b). This is known
 28 as the "on-sale bar."

1 information was material to granting the patent application, *id.* at 60–61, ¶ 39, and
2 “[b]ut for the inventor’s failure to disclose this information, and but for the failure
3 by SVC to disclose this information, the ’551 Patent would have never been
4 granted.” *Id.* at 61, ¶ 40.

5 Monson Fruit, Van Well, and the Goodwins claim that Ms. Couriard
6 acknowledged in discussions with Stemilt Growers, Inc. (“Stemilt”) that any
7 commercialization would require a grower to abide by the planned exclusive
8 license arrangement. *Id.* at 64, ¶ 51. In a request sent by SVC regarding exclusive
9 licensing in March 2002, Mr. Haddrell acknowledged that there was one “tester”
10 who was “not in good standing” and, allegedly, subsequent emails acknowledged
11 the possibility of other unauthorized pre-critical date U.S. testers. *See id.* Because
12 Ms. Couriard and Mr. Haddrell were aware of a duty of candor owed to the U.S.
13 PTO and helped prepare the inventor’s response to the Examiner’s request, they
14 allegedly “withheld material information from the Examiner of the Staccato patent
15 application with an intent to deceive the Patent Office.” *Id.* at 65, ¶¶ 52–53.

16 Under Monson Fruit, Van Well, and the Goodwins’ theory, SVC had already
17 signed an exclusive U.S. marketing agreement for Staccato with Stemilt by the
18 time they applied for a U.S. patent, and they understood that any failure to obtain a
19 patent on Staccato might jeopardize the continued success of that agreement. *Id.* at
20 67, ¶¶ 57–58. Further, Monson Fruit, Van Well, and the Goodwins claim that an
21 unnamed general manager and board member in 2008 abandoned prosecution of
22 the ’551 application because he or she realized any patent would be “invalid and
23 unenforceable.” *Id.* at 68, ¶ 59. Monson Fruit, Van Well, and the Goodwins also
24 contend that Mr. Culley and a patent attorney, Penny Aguirre, misrepresented to
25 the U.S. PTO that the decision to previously abandon the application was
26 “unintentional.” *Id.* at ¶ 60. Consequently, they assert that “AAFC, namely Mr.
27 Culley and attorney Ms. Aguirre, withheld material information from the Examiner
28

¹ of the Staccato patent application with an intent to deceive the Patent Office.” *Id.*
² at ¶ 61.

Legal Standard

A. Summary Judgment

Summary judgment is appropriate “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). There is no genuine issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict in that party’s favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The moving party has the initial burden of showing the absence of a genuine issue of fact for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). If the moving party meets its initial burden, the non-moving party must go beyond the pleadings and “set forth specific facts showing that there is a genuine issue for trial.” *Anderson*, 477 U.S. at 248. When considering a motion for summary judgment, a court may neither weigh the evidence nor assess credibility; instead, “the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.” *Id.* at 255.

In addition to showing there are no questions of material fact, the moving party must also show it is entitled to judgment as a matter of law. *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188, 1193 (9th Cir. 2000). The moving party is entitled to judgment as a matter of law when the non-moving party fails to make a sufficient showing on an essential element of a claim on which the non-moving party has the burden of proof. *Celotex*, 477 U.S. at 323. The non-moving party cannot rely on conclusory allegations alone to create an issue of material fact. *Hansen v. United States*, 7 F.3d 137, 138 (9th Cir. 1993).

B. Motion to Dismiss

To survive a Fed. R. Civ. P. 12(b)(6) motion to dismiss, a party must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp.*

v. *Twombly*, 550 U.S. 544, 570 (2007). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.* (quoting *Twombly*, 550 U.S. at 556). Counterclaims must therefore contain more than “labels and conclusions” and a counter-plaintiff’s “[f]actual allegations must be enough to raise a right to relief above [a] speculative level.” *Twombly*, 550 U.S. at 555. A dismissal under Federal Rule of Civil Procedure 12(b)(6) is proper only where there is either a “lack of a cognizable legal theory” or “the absence of sufficient facts alleged under a cognizable legal theory.” *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988).

When ruling on a motion to dismiss, “a judge must accept as true all of the factual allegations” contained in the counterclaim. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007). Further, “[t]o the extent that the pleadings can be cured by the allegation of additional facts, the plaintiff should be afforded leave to amend.” *Cook, Perkiss and Liehe, Inc. v. N. California Collection Serv. Inc.*, 911 F.2d 242, 247 (9th Cir. 1990) (citations omitted).

Discussion

A. Motion for Partial Summary Judgment on Invalidity

Monson Fruit, Van Well, and the Goodwins argue that AAFC’s patent is invalid pursuant to the on-sale bar provision, 35 U.S.C. § 102(b), because AAFC sold or offered Staccato as goods over one year before the patent application date. They contend that business records depict an exchange of money in return for Staccato material and that the testing agreements amounted to semi-commercial, if not commercial, sales. Monson Fruit, Van Well, and the Goodwins also assert that Staccato was ready for patenting prior to the critical date and had been reduced to

1 practice. Finally, they assert that despite any factual discrepancies, the Court can
2 resolve patent validity as a matter of law based on the evidence presented. ECF
3 No. 128 at 10, ¶¶ 56–57.

4 In contrast, AAFC and SVC contend that Staccato was not subject to
5 commercial sale or offer before the critical date, and the testing agreements
6 amounted to transactions for nursery services, not for sale of Staccato itself. AAFC
7 and SVC argue that every person or entity in possession of Staccato prior to the
8 critical date did so pursuant to a valid testing agreement or provided nursery
9 services for someone under a test agreement. They claim that the testing was
10 permissible experimental use, and therefore, the on-sale bar does not apply. AAFC
11 and SVC nonetheless argue that several disputed facts preclude summary judgment
12 on the issue.

13 Invalidity of a patent is a matter of law based on underlying facts. *Meds. Co.*
14 v. *Hospira, Inc.*, 827 F.3d 1363, 1365 (Fed. Cir. 2016). On summary judgment,
15 Monson Fruit, Van Well, and the Goodwins must demonstrate, by clear and
16 convincing evidence, that there was a definite sale or offer to sell Staccato more
17 than one year before the patent application. *Group One, Ltd. v. Hallmark Cards,*
18 *Inc.*, 254 F.3d 1041, 1045 (Fed. Cir. 2001). All justifiable factual inferences should
19 be drawn in AAFC and SVC’s favor. *Anderson*, 477 U.S. at 255.

20 In this case, the Court finds that genuine disputes of material fact preclude
21 summary judgment on the issue of patent invalidity. At least two material facts are
22 disputed by the parties. First, Monson Fruit, Van Well, and the Goodwins allege
23 that several Staccato growers lacked testing agreements. They assert that Twin M
24 Farms, D&J Orchards, Gaspar Orozco, Rick Kelley, Oregon State University,
25 Mike Scott, Blue Lake Orchards, and Golddigger Apples, Inc. grew Staccato
26 without testing agreements. ECF No. 79 at 5–6. Second, Monson Fruit, Van Well,
27 and the Goodwins contend that the testing occurred on behalf of parties other than
28 Staccato’s inventor, AAFC, and/or SVC. See ECF No. 78 at 2.

1 On the other hand, AAFC and SVC first assert that all Staccato farmers grew
 2 pursuant to testing agreements. AAFC contracted with three tree nurseries—
 3 Willow Drive, Columbia Basin, and Fowler Nurseries—to bud Staccato wood onto
 4 rootstock, and allegedly, the trusted nurseries provided “test trees only to growers
 5 under test agreements.” ECF No. 102 at 25, ¶¶ 55–59. Columbia Basin Nursery,
 6 for example, executed test agreements with other growers to bud Staccato wood on
 7 rootstocks. ECF No. 80 at 19 (Ex. E), 23 (Ex. G), 31 (Ex. K), 45 (Ex. R). Second,
 8 on a similar front, AAFC and SVC assert that there was a general agreement
 9 between AAFC and SVC providing that all Staccato testing was done on behalf of
 10 AAFC or its inventor. ECF No. 102 at 3.

11 Monson Fruit, Van Well, and the Goodwins characterize the issue
 12 underlying their motion as purely legal—*i.e.*, whether the testing agreements were
 13 for the sale of goods or services. However, the issue is only legal where the facts
 14 related to the transactions are uncontradicted. Of the disputed facts presented, a
 15 reasonable jury could find that AAFC’s patent is valid, for example, by finding that
 16 all growers had testing agreements executed on behalf of AAFC and that AAFC,
 17 pursuant to the contracts, retained ownership to the Staccato plant material. *See*
 18 *Anderson*, 477 U.S. at 250. Construed in the light most favorable to AAFC and
 19 SVC, these facts indicate that the growing contracts were for services rather than
 20 goods. *See id.* at 255. Both challenged facts are material to whether Staccato was
 21 on sale, rather than subject to experimental testing, one year prior to the patent
 22 application. And crucially, Monson Fruit, Van Well, and the Goodwins did not
 23 produce a single definite example of a commercial sale or offer of Staccato before
 24 the critical date. *Group One, Ltd.*, 254 F.3d at 1045. For these reasons, the Court
 25 denies Monson Fruit, Van Well, and the Goodwins’ Motion for Summary
 26 Judgment on Invalidity.

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1 B. Motion to Dismiss Counterclaim Number 3

2 Next, AAFC and SVC seek dismissal of Monson Fruit, Van Well, and the
3 Goodwins' third counterclaim of unlawful restraint of trade. They raise several
4 issues with Monson Fruit, Van Well, and the Goodwins' allegations. AAFC and
5 SVC contend that Monson Fruit, Van Well, and the Goodwins failed to allege all
6 four elements of an antitrust claim under Section 2 of the Sherman Antitrust Act of
7 1890 (the "Sherman Act"), 15 U.S.C. § 2, and also failed to meet the heightened
8 pleading standard for fraud under Federal Rule of Civil Procedure 9(b).
9 Specifically, they allege AAFC and SVC failed to plead (1) relevant market; (2)
10 market or monopoly power; (3) anticompetitive or predatory conduct; and (4)
11 injury to competition.

12 In their response brief, Monson Fruit, Van Well, and the Goodwins cite their
13 factual assertions to argue that they have stated a plausible fraud claim under the
14 theory of *Walker Process Equipment, Inc. v. Food Machinery Chemical Corp.*, 382
15 U.S. 172 (1965). Monson Fruit, Van Well, and the Goodwins name specific
16 individuals involved in the patent application who they allege intentionally omitted
17 material information when responding to the U.S. PTO Examiner's requests for
18 evidence of commercial sales or offers. They assert that a jury may infer intent
19 from this indirect and circumstantial evidence, including AAFC and SVC's
20 purported motivation to conceal, repeated failures of disclosure, and the high
21 degree of materiality of the omitted information. To illustrate, Monson Fruit, Van
22 Well, and the Goodwins cite a document that indicates, for a separate cherry
23 variety known as Celeste, SVC asked Fowler Nursery to amend a document to
24 indicate a "testing fee instead of tree price" because the Celeste patent was in
25 limbo.

26 To state a claim under *Walker Process*, Monson Fruit, Van Well, and the
27 Goodwins must demonstrate (1) that the Staccato patent was procured by knowing
28 and willful fraud practiced by AAFC and SVC on the U.S. PTO; and (2) all the

elements necessary to establish a violation of § 2 of the Sherman Act are present. *Nobelpharma AB v. Implant Innovations, Inc.*, 141 F.3d 1059, 1068–71 (Fed. Cir. 1998)); *Walker Process Equipment, Inc. v. Food Machinery Chemical Corp.*, 382 U.S. 172 (1965). The first element of alleged fraudulent procurement of a patent must be plead with particularity, as required by Federal Rule of Civil Procedure 9(b). *Exergen Corp. v. Wal-Mart Stores, Inc.*, 575 F.3d 1312, 1326 (Fed. Cir. 2009). Rule 9(b) provides that “[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.” Fed. R. Civ. P. 9(b). However, “[m]alice, intent, knowledge, and other conditions of a person’s mind may be alleged generally.” *Id.* As applied in this context, Rule 9(b) “requires identification of the specific who, what, when, where, and how of the material misrepresentation or omission committed before the PTO.” *Exergen Corp.*, 575 F.3d at 1327.

Second, Monson Fruit, Van Well, and the Goodwins must state a claim under § 2 of the Sherman Act for monopolization or attempted monopolization.⁴ With respect to the former, they must plead “(a) the possession of monopoly power in the relevant market; (b) the willful acquisition or maintenance of that power; and (c) causal antitrust injury.” *Name.Space, Inc. v. Internet Corp. for Assigned Names & Numbers*, 795 F.3d 1124, 1131 (9th Cir. 2015) (quoting *Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP*, 592 F.3d 991, 998 (9th Cir. 2010)). “[T]o state a claim for attempted monopolization, the plaintiff must allege facts that, if true, will prove: ‘(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power.’” *Coalition for ICANN*

⁴ Monson Fruit, Van Well, and the Goodwins assert claims for both monopolization and attempted monopolization. See, e.g., ECF No. 63 at 70, ¶ 66; *id.* at 73, ¶ 83.

1 *Transparency, Inc. v. VeriSign, Inc.*, 611 F.3d 495, 506 (9th Cir. 2009) (quoting
 2 *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 893 (9th Cir. 2008)).

3 The Court foremost concludes that Monson Fruit, Van Well, and the
 4 Goodwins have stated a fraud claim with sufficient particularity under the theory
 5 of *Walker Process*. While perhaps barebone, the Amended Answers state the
 6 circumstances constituting the alleged fraud. Monson Fruit, Van Well, and the
 7 Goodwins have adequately described the who, what, when, where, and how of the
 8 alleged material omission. *See Exergen Corp.*, 575 F.3d at 1327. Therefore, the
 9 claims withstand AAFC and SVC’s Motion to Dismiss.

10 To demonstrate, Monson Fruit, Van Well, and the Goodwins claim that on
 11 December 22, 2003, the U.S. PTO Examiner requested information on “catalogs,”
 12 *inter alia*, that might show whether the claimed plant “was publicly available” prior
 13 to the filing date of the application. ECF No. 63 at 59, ¶¶ 36–37. Ms. Couriard, Mr.
 14 Haddrell, and Dr. Lane responded to the communication on June 14, 2004, and
 15 allegedly knowing of the previous testing agreements and C&O Nursery catalog,
 16 omitted the material. Ms. Aguirre and Mr. Culley were also alleged to have
 17 knowledge of the widespread “public use, testing, and sales of Staccato within the
 18 United States before the critical date”—that is, the testing agreements and
 19 distribution of Staccato to select growers—but did not disclose the information
 20 after AAFC’s involvement in the patent prosecution after March 7, 2008. ECF No.
 21 63 at 61–62, ¶¶ 42–44.

22 In addition, a jury could infer deceptive intent from these individuals with
 23 indirect and circumstantial evidence, such as the alleged desire to execute an
 24 exclusive licensing agreement with Stemilt. *See TransWeb, LLC v. 3M Innovative
 25 Props. Co.*, 812 F.3d 1295, 1304 (Fed. Cir. 2016); *see also Cargill, Inc. v. Canbra
 26 Foods, Ltd.*, 476 F.3d 1359, 1366–67 (Fed. Cir. 2007). The repeated failure to
 27 disclose information of alleged high materiality, whether through one or several
 28 actors, and information regarding AAFC and SVC’s conduct or omissions when

1 patenting other varieties, such as Celeste, may also permit a jury to infer intent. *See*
 2 *id.* Regardless, Monson Fruit, Van Well, and the Goodwins are not required to
 3 allege specifics of any individual's intent or knowledge to survive a motion to
 4 dismiss. *See Fed. R. Civ. P. 9(b).* For these reasons, the Court holds that Monson
 5 Fruit, Van Well, and the Goodwins have met the particularity standard under Rule
 6 9(b). The Court next considers whether Monson Fruit, Van Well, and the
 7 Goodwins have pleaded all elements of a § 2 claim.

8 1. Market Definition

9 In their Amended Answers, Monson Fruit, Van Well, and the Goodwins
 10 assert the relevant market is sweet cherries maturing at least seven days after the
 11 Sweetheart variety in the United States, which spans a “very short, three- to four-
 12 week window” during summer. ECF No. 63 at ¶¶ 62, 63, 68. Monson Fruit, Van
 13 Well, and the Goodwins allege that “[o]ther than the Glory cherry variety accused
 14 of infringement in this case, there are no other known substitute sweet-cherry
 15 varieties . . . that are not also owned or controlled by AAFC and SVC/PICO.” *Id.* at
 16 70, ¶ 65.

17 The Court finds that Monson Fruit, Van Well, and the Goodwins pleaded a
 18 relevant market. Although the term “submarket” is not utilized by Monson Fruit,
 19 Van Well, and the Goodwins in their Amended Answers, the Court finds that
 20 Monson Fruit, Van Well, and the Goodwins have pleaded sufficient facts to
 21 demonstrate a relevant submarket. At a minimum, they have presented allegations
 22 that cherries maturing at least seven days after the Sweetheart variety have
 23 “distinct prices” and “peculiar characteristics” to constitute a submarket. *See*
 24 *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294, 325 (1962). For example,
 25 Monson Fruit, Van Well, and the Goodwins assert that, beyond Staccato’s late-
 26 maturity date, “Staccato has other horticulturally desirable characteristics,
 27 including good size, shape, disease resistance, frost resistance, and taste,” ECF No.
 28 63 at 69, ¶ 64, and that there is “no other known substitute sweet-cherry varieties.”

1 *Id.* at 70, ¶ 65. AAFC and SVC acknowledge themselves that the late-maturing
 2 variety provides a “distinct financial advantage” to growers. ECF No. 1 at 1, ¶ 2.
 3 Thus, while the relevant market could be better defined (and may yet raise further
 4 issues), it is not so insufficient to be “facially unsustainable” at the pleading stage.
 5 *Newcal Indus. v. Ikon Office Sol.*, 513 F.3d 1038, 1045 (9th Cir. 2008).

6 2. Anti-Competitive Conduct and Injury

7 Monson Fruit, Van Well, and the Goodwins next contend that enforcement
 8 of the allegedly fraudulent ’551 Patent against them, and others in the market, was
 9 to deter them and others from entering the market and that such conduct is
 10 predatory and unlawful. ECF No. 63 at 69, ¶ 62; *id.* at 70, at ¶ 66. Monson Fruit,
 11 Van Well, and the Goodwins assert that AAFC and SVC knowingly used an
 12 invalid patent to “control or attempt to control” the relevant market by limiting the
 13 number of acres planted and deterring entry into the market. ECF No. 63 at ¶¶ 66,
 14 68. Harm caused by unlawful assertion of a patent against a party may constitute a
 15 valid *Walker Process* claim. *See Hydril Company LP v. Grant Prideco LP*, 474
 16 F.3d 1344, 1350 (Fed. Cir. 2007); *cf. Nobelpharma* 141 F.3d at 1070. Monson
 17 Fruit, Van Well, and the Goodwins are also not required to demonstrate objectively
 18 reasonable apprehension from threatened enforcement of the ’551 Patent. *See*
 19 *Hydril*, 474 F.3d at 1350.

20 The Court finds that Monson Fruit, Van Well, and the Goodwins stated
 21 sufficient facts alleging anti-competitive conduct. Enforcement of a patent
 22 procured by fraud may constitute anticompetitive conduct, as it is a form of
 23 economic coercion that antitrust laws were intended to prevent. *See Hydril*, 474
 24 F.3d at 1350. The Court determines that Monson Fruit, Van Well, and the
 25 Goodwins are not required to demonstrate more at these early stages of the case
 26 and prior to completion of discovery. *See id.* Accordingly, Monson Fruit, Van
 27 Well, and the Goodwins have properly alleged anticompetitive conduct.

Monson Fruit, Van Well, and the Goodwins also request attorneys' fees arising from the patent prosecution. *See* ECF No. 63 at 70, ¶ 66; *id.* at 75. The Federal Circuit has indicated that attorneys' fees may form the basis for antitrust injury and injury-in-fact under a *Walker Process* claim. *See TransWeb, LLC*, 812 F.3d at 1310–12 (citations omitted); *see also Rickards v. Canine Eye Registration Found.*, 783 F.2d 1329, 1334–35 (9th Cir. 1986); *Quest Integrity USA, LLC v. A. Hak Indus. Servs. US, LLC*, No. C14-1971RAJ, 2016 WL 4533067, at *5 (W.D. Wash. Apr. 8, 2016). At the very least, the Court concludes that Monson Fruit, Van Well, and the Goodwins' allegations "raise a reasonable expectation that discovery will reveal evidence of an injury to competition." *Toronto v. Jaffurs*, 297 F. Supp. 3d 1073, 1090 (S.D. Cal. 2018) (quoting *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1198 (9th Cir. 2012)). Thus, for purposes of the Motion to Dismiss, the Court concludes that Monson Fruit, Van Well, and the Goodwins' claims are sufficient to establish both anticompetitive conduct and antitrust injury under the Sherman Act.

3. Market or Monopoly Power

The Amended Answers state that the relevant market includes Staccato, Glory, and at least one other variety that is also owned or controlled by AAFC and SVC. ECF No. 63 at ¶ 65. Monson Fruit, Van Well, and the Goodwins also allege that, to the extent other late-maturity varieties might have been developed, or could be developed in the future, AAFC and SVC have used the allegedly fraudulent patent to eliminate them from the market. *See id.* at 70, ¶ 66.

Finally, the Court finds that Monson Fruit, Van Well, and the Goodwins satisfactorily allege market or monopoly power. AAFC and SVC did not cite, and the Court could not locate, any authority requiring that a party plead an exact percentage of market control to survive a motion to dismiss. Based on the facts as articulated in the Amended Answers, AAFC and SVC have market power over two of the three varieties of sweet cherries in the alleged submarket. *See Rebel Oil Co.*

1 *v. Atl. Richfield Co.*, 51 F.3d 1421, 1438 n.10 (9th Cir. 1995) (declining to adopt a
2 bright-line rule for defining market share). To the extent AAFC and SVC deny the
3 factual allegations of its ownership or market share, such is a question of fact and
4 inappropriate for resolution on a motion to dismiss. *Cargill Inc. v. Budine*, No.
5 CV-F-07-349-LJO-SMS, 2007 U.S. Dist. LEXIS 89643 *16–17 (E.D. Cal. Nov.
6 27, 2007). It is adequate that Monson Fruit, Van Well, and the Goodwins have
7 pleaded facts that, if true, present a plausible claim on its face. *Twombly*, 550 U.S.
8 at 570. For all the foregoing reasons, the Court finds that Monson Fruit, Van Well,
9 and the Goodwins pleaded a plausible claim under § 2 of the Sherman Act.

10 **Conclusion**

11 The Court concludes that genuine disputes of material fact preclude
12 summary judgment on patent invalidity, and Monson Fruit, Van Well, and the
13 Goodwins failed to proffer clear and convincing evidence of a definite sale or offer
14 of Staccato one year prior to the patent application. Further, Monson Fruit, Van
15 Well, and the Goodwins stated a plausible claim under the theory of *Walker-*
16 *Process* fraud, and the alleged fraud was pleaded with sufficient particularity. Both
17 motions are denied.

18 Accordingly, **IT IS HEREBY ORDERED:**

19 1. Defendants' Motion for Partial Summary Judgment on Validity, ECF
20 No. 78, is **DENIED**.

21 2. Plaintiff and Third-Party Defendant's Motion to Dismiss
22 Counterclaim Number 3, ECF No. 90, is **DENIED**.

23 **IT IS SO ORDERED.** The District Court Clerk is hereby directed to enter
24 this Order and to provide copies to counsel.

25 **DATED** this 3rd day of January 2022.

26 
27

28 Stanley A. Bastian
Chief United States District Judge

ORDER DENYING PLAINTIFF'S MOTION TO DISMISS ... *18